



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

July 9, 2015

MEMORANDUM

TO: Danny Harris
Chief Information Officer

FROM: Susan Winchell
Assistant General Counsel for Ethics

SUBJECT: Follow-Up Ethics Guidance

The purpose of this memorandum is close the loop on several ethics issues raised by the Office of Inspector General (OIG) in a report of findings sent to then Deputy Secretary Tony Miller on April 2, 2013, and a follow-up memorandum sent to current Acting Deputy Secretary John King on March 23, 2015. Specifically, this memorandum follows-up with you on some guidance we discussed at a meeting last year concerning conflicts of interest involving personal friends and addresses other ethics issues raised by the OIG in its correspondence.

Personal Friendships with Contractor Staff

As we discussed in our meeting last year, and as I summarized in an email to you dated March 12, 2014, the issue of conflicts of interest when it comes to personal friends raises an interesting question. First, the interests of personal friends are not imputed to you under the criminal conflict of interest statute, 18 U.S.C. § 208, so the applicable rule is found in the regulatory Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R Part 2635.

Section 2635.502 of the Standards requires an employee to recuse himself from certain particular matters when a determination is made that a reasonable person with knowledge of all the relevant facts would question his impartiality. This obligation to recuse pertains to particular matters involving specific parties, such as contracts, grants, settlement agreements, investigations, and the like, when a member of the employee's household has a financial interest in such matter, or in which someone with whom the employee has a "covered relationship" is, or represents, a party in such a matter. The Office of Government Ethics, which wrote and issues guidance on this regulation, intentionally excluded personal friendships from the list of "covered relationships. OGE Informal Advisory Opinion 01 X 8 (8/23/01).

Nonetheless, the regulation offers a process for employees and ethics officials to resolve impartiality questions even when the specific circumstances are not covered by the

regulation. Specifically, the regulation states that “[a]n employee who is concerned that the circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.” 5 C.F.R. §2635.502(a)(2). In other words, in the first instance, an employee may decide whether working on a matter involving a friend will create the kind of appearance concern that requires a recusal. If an employee determines that a recusal is not required and proceeds accordingly, that employee has not violated the rules, even if the ethics official or the employee’s supervisor later expresses disagreement with this determination.

Having said this, whether an employee should recuse himself from a matter because it involves or affects a friend depends on the specific circumstances in each case. Long-time career Federal officials may have formed many friendships with individuals they work with, both inside and outside the agency. These friendships will be of varying degrees of closeness. For example, on one end of the spectrum an employee may meet their spouse through work; and at the other are friendly acquaintances with whom an employee might share a cup of coffee on an irregular basis. Obviously these two examples do not present the same problem from an appearances standpoint. As a general rule of thumb, the closer a personal friendship is, the more necessary it will be to examine whether a recusal is necessary before you work on a Department matter involving or affecting that friend. As you have done in the past, I encourage you to seek guidance from an ethics official if you are ever concerned about whether you should work on a Department matter that will involve or affect someone you regard as a close personal friend.

Personal Friendships and Business Relationships with Subordinate Employees.

Many of the same concerns outlined above can crop up when supervisors and subordinates form friendships or outside business relationships. In this case the rules seek to ensure the supervisors do not create circumstances in which it may appear to a reasonable person that he cannot be impartial with respect to decisions about promotions, bonuses, or assignments because of some sort of personal relationship with a subordinate.

Here are some examples that may be problematic:

- 1) A supervisor and subordinate form a romantic relationship outside of work. It becomes serious when they begin discussing moving in together or getting married. At some point on the spectrum from first date to wedding day these two employees may no longer serve in the same chain of command because the supervisor must recuse himself from matters involving or affecting his significant other, and one will have to either be reassigned or leave the agency.
- 2) An employee knows that his boss has an outside yard service business, and he has a lawnmower and lots of time on weekends. This employee offers to help out with his boss’s business on weekends for a little extra cash. If they do enter into this outside business relationship, the boss must recuse herself from making any decisions about the employee’s promotions, bonuses, assignment – in short,

creating this outside business relationship will create practical difficulties for these two to continue working together in the same chain of command.

On the other hand, these rules do not prevent supervisors and subordinates from having friendly relationships, or from sharing joys and concerns as they arise. In my experience many employees actually function more effectively if they believe their supervisor cares about them, including personal milestones and troubles. These normal and ordinary human interactions generally will not invoke a need for a recusal. So, again, whether personal friendships with staff will trigger a recusal requirement depends on the nature of the friendship involved.

One last note about ethics and subordinates: There is a rule in the Standards that basically prohibits subordinates from giving a gift to their supervisor, and supervisors from accepting gifts from subordinates. 5 C.F.R. Subpart C. However, the rules do not prohibit supervisors from giving gifts to their subordinates. Nonetheless, we have gotten complaints about this from subordinates when they feel the supervisor has treated one employee more generously than others. For example, if a supervisor lends a subordinate a significant amount of money or gives a subordinate a very valuable gift, it may at least create the appearance that the supervisor is giving preferential treatment to one or some employees and not others, and at the very least can create bad feelings in an office.

Personal Use of Government Equipment and Information Resources

One of the issues raised during the course of the OIG's inquiries was whether you improperly used government email in connection with your outside audio-visual installation and car detailing activities. The Standards prohibit Federal employees from using government property for other than an "authorized purpose." 5 C.F.R. § 2635.704. The Department policy on personal use of government equipment and information resources spells out the contours of "authorized purpose" for equipment such as phones, computers, email, copiers, fax machines, etc. ACS Directive OIG 1-104 (4/17/06). This policy permits some personal use of government equipment and information resources, including official email accounts, when certain conditions are met. However, the policy expressly prohibits personal use of these resources for various activities, including running an outside business.

As I understand it, it remains unclear whether your outside activities that were the subject of the OIG inquiry are properly regarded as a business or a hobby. However, a good rule of thumb is that if an activity results in income required to be reported on a financial disclosure report it is a business activity and you should refrain from using government equipment and information resources in connection with that activity.

Please let me know if you have questions. I can be reached at 202/401-6003.

